

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STACY L. BOSACK)	
Claimant)	
VS.)	
)	Docket No. 262,193
CHERRY VILLAGE, INC.)	
Respondent)	
AND)	
)	
KANSAS HEALTH CARE ASSOCIATION)	
Insurance Carrier)	

ORDER

Claimant appeals the April 26, 2001 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant alleges she injured her back at work on September 14, 2000. Judge Moore denied claimant's request for benefits finding claimant failed to prove that she suffered personal injury by accident arising out of and in the course of her employment with respondent. Judge Moore also found claimant failed to prove that she gave respondent timely notice of her alleged accident. Those are the issues claimant raises for review by the Board.

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds that the ALJ's Order should be affirmed.

1. Claimant has been employed by respondent as a certified nurses aide (CNA) this time since August 31, 1998. She also had a previous period of employment with respondent.
2. Claimant testified that on September 14, 2000 she hurt her back lifting a resident by the name of Darrell Mounkes. Claimant alleges she called for help and was assisted by two co-workers, Melissa Crawford and Jo Ellen Jacobs. Claimant further testified that she immediately told those two co-workers that she had hurt her back lifting Mr. Mounkes. Claimant admits, however, that she did not report the accident to any supervisor that day. She was able to continue working and complete her shift.

3. Both Ms. Jacobs and Ms. Crawford testified and denied providing any assistance to claimant with Mr. Mounkes on September 14, 2000 and denied having any knowledge of claimant's alleged accidental injury on that date. Moreover, Ms. Crawford testified that she was not even at work on that date. This testimony is confirmed by Ms. Crawford's time card. Furthermore, Ms. Jacobs and Ms. Crawford work in the Alzheimer's unit, which is a separate unit from claimant, and which is separated from Mr. Mounkes' room by 30 feet, a nurse's station and two closed and locked doors.

4. Claimant sought medical treatment on her own from Merle J. Fieser, M.D., the next day. Claimant states that she informed Dr. Fieser on September 15, 2000 that she was there for a work related injury. The medical records in evidence, however, do not contain such a history. Dr. Fieser did give claimant an off work slip which claimant's husband, Wayne Bosack, delivered to respondent.

5. Mr. Bosack testified he delivered the off work slip from Dr. Fieser to Mr. Jim Herman, respondent's director of nursing. According to Mr. Bosack, he informed Mr. Herman that his wife had hurt her back at work. Thereafter, Mr. Bosack delivered a second off work slip to Mr. Herman and says he again told Mr. Herman that it was for a work related accident. Mr. Bosack said both these conversations took place in the presence of the secretary or receptionist, Pat Harwood, who did not testify. But Mr. Herman testified and denied that claimant's husband gave him notice of a work related injury when he delivered the off work slips.

6. Claimant admits that she never gave Mr. Herman notice of a work related injury herself. But claimant testified she personally gave notice to one of her supervisors, Carla Schreiber in October of 2000. Ms. Schreiber testified and denied ever receiving notice of a work related injury from claimant. She acknowledged being aware that claimant was off work due to back pain, but Ms. Schreiber believed the pain was from an accident claimant had suffered away from work in May of 2000. Although claimant testified that the May 2000 accident was also work related, this is contradicted by a handwritten statement she provided to respondent in which claimant stated that the May 2000 accident did not happen at work.

CONCLUSIONS OF LAW

1. For an injury to be compensable, a claimant must prove that the injury was caused by an accident which arose out of and occurred in the course of employment.¹ An injury is also compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.² In such cases, the test is not whether the

¹ K.S.A. 44-501(a).

² *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971); *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* ____ Kan. ____ (2001).

accident caused the condition, but whether the accident aggravated or accelerated a preexisting condition.³

2. Workers have the burden of proof to establish their rights to compensation and to prove the various conditions upon which those rights depend.⁴

3. "Burden of proof" means the burden to persuade by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.⁵

4. Because claimant has not proven that she injured herself while working for the respondent, the request for preliminary hearing benefits was properly denied.

5. In addition, claimant has failed to prove that she gave respondent notice within ten days of her accident and has failed to prove just cause for this failure.

6. As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁶

WHEREFORE, the Appeals Board affirms the April 26, 2001 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Christopher J. McCurdy, Overland Park, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director

³ Woodward v. Beech Aircraft Corporation, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁴ K.S.A. 44-501(a).

⁵ K.S.A. 44-508(g).

⁶ K.S.A. 44-534a(a)(2).